United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7583

United States Court of Appeals
FOR THE SECOND CIRCUIT

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P/S

V/O EXPORTKHLEB,

Plaintiff-Appellant,

against

TEXAS TRANSPORT & TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F. AHRENKIEL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT V/O EXPORTKHLEB

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Plaintiff-Appellant
V/O Exportkhleb
96 Fulton Street
New York, New York 10038
(212) 233-6171

JOSEPH M. MANGINO
EVELYN F. COHN
Of Counsel

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POINT I

TTT had apparent authority to bind Ahrenkiel.

It is an old and well-settled principle of law that the rights of innocent third parties

> do not depend upon the actual title or authority of the party with whom they deal, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which through negligence or mistaken confi-

dence, he caused or allowed to appear to be vested in the party making the conveyance.

Cowdry v. *Vandenburgh*, 101 U.S. 572 (1879).

This creation of apparent authority must of course emanate from the principle and not the apparent agent. *Smith-Perry Electric Co.* v. *Transport Clearings*, 243 F.2d 819 (5th Cir. [Tex.] 1957); *Perry* v. *N.Y. Life Ins. Co.*, 22 N.Y.S. 2d 696 (1940). Thus, the critical issue before this court is what did Ahrenkiel do which created an appearance that TTT was authorized to grant extensions of time on its behalf? Ahrenkiel set the tone for all future dealings with respect to the dispute herein as early as June 1, 1973. On that date a letter was signed by the master of the M/V "Constantia", one whom no one doubts is the spokesman for the owner, authorizing TTT to "sign *any and all documents regarding the cargo of grain laden onboard my vessel* during my recent call to this port" (A20) (Emphasis added).

This letter created a right in TTT to sign on behalf of the owner, any and all papers regarding the grain now the subject of this action. One of the documents TTT signed was the bill of lading. The other documents which TTT signed on behalf of Ahrenkiel were the two confirmations of orally granted extensions of time for suit (A21, A23).

No evidence has been adduced by defendants in support of a limited agency. Certainly the language of the letter of authorization does not convey any limitation other than that the documents relate only to the grain recently loaded aboard the M/V "Constantia." This dispute involves that very grain as did the two extensions of time now under review by this court. Where a principal wishes to confer limited authority confined to a particular purpose, it must clearly delineate and circumscribe such restriction on power. This, Ahrenkiel did not do.

Innocent third parties are under no legal duty to divine that which might have been intended between principal and agent. The letter of authorization is not phrased so as to indicate that TTT was *only* authorized to sign bills of lading relating to the grain, or for that matter that TTT could only sign any specific document. It clearly states *any and all documents* may be signed.

Accordingly, by its own act, Ahrenkiel has permitted TTT to appear to have authority to grant extensions of suit time on its behalf, and now is estopped to deny such agency, though as between it and TTT none may exist and both deny its existence. The agency is based on a theory of equitable estoppel founded on the principle that where one of two innocent parties must suffer from the wrongful act of another, the loss should fall upon the one who by his conduct, created the circumstances which enabled the third party to perpetrate the wrong and cause the loss. 3 Am. Jur. 2d Agency § 76.

POINT II

An agent may orally waive his principal's right to assert the defense of statute of limitations.

Plaintiff refrained from commencing suit within the one year time for suit period provided by the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1303(6) because TTT, acting as apparent agent for Ahrenkiel, granted it two extensions of time in which to sue. Each extension was granted orally *prior* to the expiration of the original or extended period and subsequently *confirmed* in writing. (A 21, A23).

Oral extensions of statutory time limitations on suit time are recognized as valid and binding upon the parties concerned if made prior to the expiration dat *Thomson* v. *Phenix Ins. Co.*, 136 U.S. 287, 10 S. Ct. 1019, 34 L. Ed. 408 (1889); *Glus* v. *Brooklyn Eastern District Terminal*,

359 U.S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959); *The Argentino*, 28 F. Supp. 440 (S.D.N.Y. 1939).

In *The Argentino* the District Court for the Southern District of New York denied a motion to dismiss a libel for failure to commence a timely suit. There, an agent of the carrier granted oral extensions of time and negotiations continued after the one year COGSA period had passed. As in the matter at bar, there were questions as to whether the agent was authorized to grant extensions of time and thereby waive the carrier's right to assert the one-year limit provided in COGSA. The court did not make a final determination but stated:

> . . . there is at least an issue of fact as to Mr. Smith's authority to make the waiver for the carrier, which should be reserved for trial and should not be determined on this motion.

As to whether the conduct of the parties amounted to a waiver, this too the court decided should be reserved for trial. Thus, not only are such questions properly determined at trial rather than on motion in Canada, *International Paper Sales Co., Inc.* v. *Fundy Shipping Ltd.*, 1970 A.M.C. 1358 (not officially reported), but also right here in the Southern District of New York. No doubt defendant TTT overlooked *The Argentino* in its answering brief which was remarkably unburdened with supporting legal citations.

Siegelman v. *Cunard White Star*, 221 F. 2d 189 (2d Cir. [N.Y.] 1955) also considers the effect of an agent's assurances that suit might be postponed pending negotiations of the claim as a waiver or estoppel of owner's right to assert the defense of statute of limitations. In considering this question, the majority applied English law while the dissent determined United States law to be applicable. Under New York law, the dissenting Judge Frank found that agent's advice to plaintiff that no suit was necessary since

an early settlement was expected constituted a waiver of the carrier's right to raise the one year defense, although only orally made.

Clearly, then a carrier may, through an agent, waive the time limitation, and whether the particular agent has specific authority to waive a condition is a question of FACT which "may be established by a course of conduct or by the word or deed of an agent acting within the scope of his real or apparent authority." *Beloz* v. *Tioga County Patrons' Fire Relief Ass'n.*, 21 N.Y.S.2d 643 affirmed 23 N.Y.S.2d 460 (1940).

POINT III

Even if no agency is found to exist plaintiff's complaint should not be dismissed for lack of *in personam* jurisdiction.

Where an action is founded in admiralty, it may be placed into suit in any district court of the United States and

> It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the district shortly; and when suit is so instituted it constitutes the bringing of suit within the requirement of 46 U.S.C.A. § 1303(6) that suit be instituted within a period of one year, even though process is not issued until after the expiration of the one year period.
>
> * * *
>
> The courts of the United States comprise one great system for the administration of justice. If a libellant has filed a libel in one district, thinking that a vessel will be found there, and later finds that the vessel is in another district where the libel could have been

> filed, there is no reason why the proceedings should not be transferred to the latter instead of being dismissed, with the necessity upon libellant of starting all over again. Especially is this true, where, as here, the new proceeding would be barred by the statute of limitations.

Internatio-Rotterdam, Inc. v. *Thomsen*, 218 F.2d 514, 515-517 (4th Cir. Md. 1955).

Accordingly, suit was properly commenced in the Southern District of New York in order to protect suit time as extended by TTT as apparent agent for Ahrenkiel. Service on Ahrenkiel was then attempted through TTT as it was believed that the broad authority conferred upon TTT by the June 1, 1973 letter was a sufficient predicate for jurisdiction over Ahrenkiel. In the event this court affirms the lower court decision that no agency relationship was existent between TTT and Ahrenkiel, it should nonetheless reinstate the complaint and permit plaintiff to attempt service upon Ahrenkiel by other means. Such an alternative is supported by *Grammenos* v. *Lemos*, 457 F.2d 1067 (2d Cir. [N.Y.] 1972) wherein the court quoted with approval, *Stanga* v. *McCormick Shipping Corporation*, 268 F.2d 544 (5th Cir. [La.] 1959), to wit:

> There may well come a time in which the Trial Court, in the administration of the affairs of the Court, sees that there is simply no reasonably conceivable means of acquiring jurisdiction over the person of a defendant. When that time comes it may be proper to dismiss the cause. But, on this record, relating to one single attempted service of process, that point has not yet been reached.

Stanga v. *McCormick Shipping Corporation, supra,* parallels the case at bar with respect to the questions of agency and jurisdiction. In McCormick, service was attempted upon a foreign shipowner by service upon an al-

leged agent. As in the matter at hand, the shipowner was not incorporated or authorized to do business in the state in which suit was brought. In addition, it neither maintained offices or employed personnel or designated agents to act on its behalf in the state of suit. Nonetheless, plaintiff served a travel bureau which solicited, booked, confirmed, issued and delivered passage contracts on behalf of McCormick, claiming that such service was sufficient to subject McCormick to *in personam* jurisdiction. In an interestingly written opinion in which the three judges note their diverging views at various points in their decision, Judge Brown, expressing his own view, found that the travel bureau was indeed an agent of the shipowner and that the shipowner did sufficient business through the acts of the agent to be amenable to *in personam* jurisdiction. Judge Brown found that the travel bureau did more than merely solicit passages for McCormick and was more accurately the lifeblood of the shipowner's business. Thus, suit in Louisiana did not offend "traditional notions of fair play and substantial justice."

In the case at bar, it remains uncertain what activities TTT is authorized to perform on behalf of Ahrenkiel. It would therefore be appropriate to remand this matter to the district court for further discovery as to whether Ahrenkiel has the minimum contacts with the State of New York necessary to render it amenable to process without offending due process requirements.

Of course, if this court finds that further discovery is not required, and that on the basis of the facts before it that service of process upon TTT does not subject Ahrenkiel to in personam jurisdiction, it may still permit service on Ahrenkiel by other means, as did the majority in the *McCormick* case. This solution would certainly be far more judicious and equitable than a complete dismissal of plaintiff's complaint without consideration of its merits.

CONCLUSION

The order dismissing plaintiff's complaint should be reversed and the action remanded to the District Court for trial.

Respectfully submitted,

HILL RIVKINS CAREY LOESBERG & O'BRIEN
Attorneys for Plaintiff-Appellant
V/O EXPORTKHLEB
96 Fulton Street
New York, New York 10038
(212) 233-6171

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EVELYN F. COHN
Of Counsel

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State of New York,
County of New York,
City of New York--ss.:

IRVING LIGHTMAN, being duly sworn, deposes and says that he is over the age of 18 years. That on the 23rd day of February, 1977, he served two copies of Appellant's Reply Brief on Bigham Englar Jones & Houston, Esqs. and Cichanowicz & Callan, Esqs., the attorneys for Appellee Texas Transport and for Appellee Ahrenkiel respectively by delivering to and leaving same with a proper person in charge of their office at 99 John Street and 80 Broad Street, respectively in the Borough of Manhattan, City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
23rd day of February, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978